Nos. 87-1622, 87-1697 and 87-1711

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHILIP BRENDALE,
Petitioner,
v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *et al.*,
Respondents.

STANLEY WILKINSON,
Petitioner,
v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

COUNTY OF YAKIMA, *et al.*,
Petitioners,
v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER PHILIP BRENDALE

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REPLY BRIEF FOR PETITIONER PHILIP BRENDALE

I. INTRODUCTION

Respondent-Yakima Indian Nation and its *amici* rely on three (3) primary arguments in asserting the Ninth Circuit's decision in this case should be affirmed.

1. The Yakima Nation asserts it has not been deprived of its authority to regulate land use by non-Indians on fee land within the exterior boundaries of the reservation by treaty, Acts of Congress, or by implication as a necessary result of its dependent status. *Montana v. United States*, 450 U.S. 544 (1981), which found a general divestiture of civil authority, was, therefore, incorrectly decided. [Brief of Respondent-Yakima Indian Nation (RB) 37, 39-43.]

2. The Tribe also argues, assuming *Montana* to be correctly decided and applicable, the "closed area" of the reservation is a distinct and separate portion of the reservation over which the Yakima Nation has exclusive land use jurisdiction and county zoning of fee land within any part of the reservation is a *per se* interference with tribal self-government because county jurisdiction over fee land within the reservation precludes comprehensive reservation and use planning and regulation by the Yakima Nation. (RB 17, 29-31.)

3. The Yakima Nation also asserts imposition of its land use regulations on fee land owned by non-members raises no constitutional questions because land use regulation is a retained sovereign power, *not* a power delegated by Congress and, therefore, exempt from constitutional restrictions. (RB 47-49.)

Each of the arguments of the Yakima Nation and its *amici* misconstrue the holdings of this Court as well as the intent and effect of the various statutes they rely on and must be rejected.

II. *MONTANA* CORRECTLY HELD INDIAN TRIBES HAVE BEEN DIVESTED OF GENERAL CIVIL REGULATORY AUTHORITY OVER NON-MEMBERS ON FEE LAND WITHIN THE RESERVATION.

A. The Yakima Nation's dependent status divests it of civil authority over non-members by necessary implication.

The Yakima Nation acknowledges the Tribe's sovereign powers have been limited to "those aspects of sovereignty not withdrawn by treaty or statute or by implication as a necessary result of their dependent status". *United States v. Wheeler*, 435 U.S. 313, 323 (1978). (RB 36)

The Yakima Nation contends, however, the divestiture of its sovereign power as a result of its dependent status is limited to the powers which the Court specifically enumerated in *Wheeler*, 435 U.S. at 326, which included alienation of land occupied by the Tribe to non-Indians, entering direct commercial or governmental relations with foreign nations and criminal jurisdiction over non-members in Tribal Courts. Immediately before listing those divested powers, the Court stated:

* * * *

> "The areas in which such implied divestiture of sovereignty have been held to have occurred are those involving relations between an Indian tribe and non-Indian members of the tribe." *Wheeler*, 435 U.S. at 326.

* * * *

In addition, *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 209, stated:

* * * *

> "Nor are the intrinsic limitations on Indian tribal authority restricted to limitations on the tribe's power to transfer land or exercise external political sovereignty."

* * * *

The list of divested powers contained in *Wheeler* is clearly not inclusive but merely an example of the powers which have been lost through the Tribe's dependent status. This fact was recognized and emphasized in *Montana*, 455 U.S. at 564:

* * * *

> "The exercise of tribal powers beyond what is necessary to protect tribal self-government or control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."

* * * *

Montana, *Wheeler* and *Oliphant* establish a Tribe's dependent status deprives it of jurisdiction over non-members of the Tribe unless one of the *Montana* exceptions is satisfied.

Contrary to the argument of Respondent-Yakima Nation, *Montana* is not inconsistent with *U.S. v. Mazurie*, 419 U.S. 544 (1975). In *Mazurie*, the Court specifically refrained from deciding whether the Tribe's sovereign authority was sufficient for it to regulate the sale of alcohol by non-members on fee land within the reservation. The Court merely held the Tribe, consistent with *Montana*, retained authority over matters which affect the internal and social relations of tribal life, distribution and use of intoxicants affected those relations, and, therefore, its limited, retained authority was sufficient to allow Congress to delegate a portion of its authority under the Commerce clause to regulate the sale of alcohol by a non-Indian on fee land within the reservation. *Mazurie*, 419 U.S. at 557.

Mazurie is also consistent with *Montana* because the non-Indian subjected to regulation in that case was engaged in the sale of alcohol to tribal members on the reservation and subject to tribal regulation pursuant to the "consensual relationship" test established by *Montana*.

Montana's recognition of the Tribe's civil regulatory authority over non-members on fee land was divested by the Tribe's dependent status and the application of the *Montana* rule to preclude tribal land use regulation on fee land in this case is the logical extension of and supported by this Court's ruling in *Oliphant*.

Although *Oliphant* dealt only with criminal jurisdiction over non-members, the United States' guarantees of personal liberty, which the Court held supported the finding criminal jurisdiction was inconsistent with the Tribe's dependent status, fully support the similar divestiture of civil regulatory jurisdiction where, as here, civil property rights protected by the United States Constitution and Bill of Rights are at issue.

B. *Montana* correctly determined the effect of the General Allotment Act, 25 USC 331, *et seq.* ("Dawes Act") on Respondent's civil regulatory authority.

The Yakima Nation and its *amici* argue the Dawes Act, 25 USC 331, *et seq.*, had no effect on a tribe's regulatory authority within the exterior boundaries of a reservation and the *Montana* Court's holding (450 U.S. at 559, N.9) Congress did not intend non-Indians who settled on alienated allotted land to be subject to tribal regulatory authority is erroneous and should be rejected.

Contrary to the Yakima Nation's position, *Montana* correctly found the allotment and alienation of land pursuant to Congressional Allotment Acts changed both the character and jurisdiction of land within the Yakima Reservation.[1]

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[1] The assertion of the Yakima's Nation's *amici*-Colville Tribe, *et al.*, at 10, n.10 of their Brief, allotments on the Yakima Reservation were pursuant to special treaty provision is completely unfounded. The 1915 allotment to Margaret Smith (Brendale Trial Exhibit 201) from whom Petitioner-Brendale obtained title incorporates the language of 25 USC 348 and was clearly issued pursuant to the General Allotment Act.

The Yakima Nation and its *amici* rely on *Seymour v. Superintendent*, 368 U.S. 351 (1962), *Mattz v. Arnett*, 412 U.S. 481 (1973), and *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), in support of their contention the Dawes Act had no effect on tribal jurisdiction over allotted and patented lands. The issue presented in *Seymour* and *Mattz* was, however, a conflict between state and federal jurisdiction, not state and tribal jurisdiction which was resolved by application of 18 USC 1151 defining "Indian country" subject to federal jurisdiction to include patented land.

The Court in *Seymour*, however, acknowledged land allotted and ultimately patented to non-Indians had, prior to enactment of 18 USC 1151, been recognized as *not* being subject to federal or tribal jurisdiction. 368 U.S. at 357.[2]

In *Seymour*, the Court held the strongest argument against exclusion of patented land from an Indian reservation was the creation of an "impractical pattern of checkerboard jurisdiction" which 18 USC 1151 was designed to avoid. 368 U.S. at 358. *Seymour* was relied on by the Court in *Mattz* for its holding the Allotment Acts did not affect the reservation status of patented land. 412 U.S. at 479. *Moe* also relied on *Seymour* and *Mattz* in its holding on the effect of the Allotment Acts. 425 U.S. at 478.

The Court's primary objection to finding patents issued pursuant to the Allotment Acts divested tribes of jurisdiction over the patented land has been eliminated by this Court's decision in *Washington v. Yakima Indian Nation*, 439 U.S. 436 (1979), where the Court specifically approved Washington's partial assumption of jurisdiction over the Yakima Reservation pursuant to PL 280

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[2] This fact was also recognized by the Court in *Solem v. Barnett*, 465 U.S. 463, 468 (1984).

(28 USC 1360) and RCW Chap. 37.12, which created the "checkerboard jurisdiction" which the Court found objectionable in *Seymour* stating at 439 U.S. 502:

* * * *

> "The lines the state has drawn may well be difficult to administer. But they are no more or less so than any other classifications that pervade the law of Indian jurisdiction. See, *Seymour v. Superintendent* 368 U.S. 31; *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463. Chapter 36 [RCW Chap. 37.12] is fairly calculated to further the state's interest in providing protection to non-Indian citizens living within the boundaries of the reservation at the same time allowing scope for tribal self-government on trust or restricted lands. . . . In short, checkerboard jurisdiction is not novel in Indian law and does not, as such, violate the Constitution."

* * * *

This Court's approval of Washington's assumption of "checkerborad jurisdiction" within the reservation, appears to have specifically considered and rejected the *Seymour* Court's prior basis for holding State jurisdiction over land patented pursuant to the Allotment Acts was untenable.

In *Montana*, which was decided after all the cases cited above, the Court specifically reviewed the legislative history of the Allotment Acts which it had not done in the cases relied on by the Yakima Nation, and determined Congress's intent was: non-Indians who settled on alienated allotted fee land would *not* be subject to tribal regulatory authority. The *Montana* Court recognized the allotment policy was repudiated by the Indian Reorganization Act but specifically found Congressional intent about regulatory jurisdiction over land pursuant to the Allotment Acts remained effective despite the policy change.

Montana's recognition of the Congressional intent non-Indians who acquired allotted fee land would be free from

tribal regulation is consistent with the general understanding which existed before the 1948 enactment of 18 USC 1151. The alienation of allotted land precludes the Yakima Nation's civil regulatory jurisdiction over allotted fee land within the Yakima Indian Reservation.

Morris v. Hitchcock, 194 U.S. 384 (1984), and *Buster v. Wright*, 135 Fed. 947 (8th Cir. 1905), appeal dismissed 203 U.S. 599 (1906), relied on by the Yakima Nation's *amici* are *not* contrary to *Montana*. The decision in *Morris* dealt only with a tribe's authority to tax cattle of non-members on rented trust land; authority which the tribe would have pursuant to the "consensual relations" exception to *Montana*'s holding a tribe's dependent status deprives it of civil regulatory jurisdiction over non-members on fee land. See: *Montana*, 450 U.S. at 565-566. Discussions in *Morris* about authority over non-member fee land were completely unnecessary to the decision and are mere *dicta*.

Although "fee land" was involved in *Buster v. Wright*, the tribe's regulatory authority was also within *Montana*'s "consensual relations" exception. 450 U.S. at 565.

C. The *Montana* rule is not contrary to post-Allotment Act legislation.

As described above, *Montana* recognized the Indian Reorganization Act repudiated the allotment policy but did not eliminate congressional intent the alienated, allotted fee land would be free of tribal regulation.

The Indian Reorganization Act merely recognized the tribes had some existing powers but because of the tribes' dependent status and the effect of the Allotment Acts, these powers did not include civil regulatory jurisdiction over non-Indians on fee land within the reservation. The Indian Reorganization Act did *not* restore or delegate sovereign powers previously divested from the tribes. See: Brief of *Amici* Arizona, *et al.*, 15-16.

This Court recognized in *Montana*, 450 U.S. at 459, sovereign powers which are divested by a tribe's dependent status cannot be restored, except by express congressional delegation.

The recent congressional enactments cited by the Yakima Nation and their *amici* do not, as they argue, recognize existing tribal sovereignty over alloted fee land within reservations but appear to delegate congressional authority in specific situations where tribes comply with specific legislatively mandated requirements.

In the Safe Drinking Water Act, 42 USC 300j-11, and the Federal Insecticide, Fungicide and Rodenticide Act, 7 USC 136u, a federal administrative official is specifically authorized to delegate federal authority to Indian tribes. 42 USC 300j-11 limits delegation to tribes complying with specific standards, including the administrator's discretionary determination the tribe is actually capable of performing the functions delegated by the Act.

The Clean Water Act, 33 USC 1377 authorizes the treatment of Indian tribes as states but only to the extent the water resources involved are owned by or held in trust for an Indian tribe, or are owned by members of a tribe and subject to restrictions on alienation if located within the reservation. 33 USC 1377(e)(2).

This delegation of authority, to the extent it may grant a tribe regulatory jurisdiction over non-member fee land, is consistent with *Montana*'s holding sovereign powers, once divested, can only be restored by express congressional enactment.

The other recent acts cited by the Yakima Nation such as the Indian Self-Determination and Education Assistance Act, 25 USC 450, *et seq.*; Indian Financing Act of 1974, 25 USC 1451, *et seq.*, and Land Consolidation Act of 1983 as amended by the Act of October 30, 1984, 25 USC 2201, were all intended to stimulate tribal self-

sufficiency and assist the tribes in developing resources on their land and do not grant or recognize any tribal sovereign powers, particularly any powers or jurisdiction over allotted fee land within the reservation.

Nothing in the above congressional enactments diminishes *Montana*'s clear holding the dependent status of the tribes and the alienation of allotted, patented land within the reservations divested tribes of their jurisdiction over non-tribal member previously allotted fee land.

III. YAKIMA COUNTY REGULATION OF FEE LAND USE WITHIN THE YAKIMA INDIAN RESERVATION DOES NOT THREATEN OR DIRECTLY AFFECT THE POLITICAL INTEGRITY, ECONOMIC SECURITY, HEALTH AND WELFARE OF THE YAKIMA NATION.

A. Yakima County land use regulation of Petitioner-Brendale's property does not threaten or directly affect the Yakima Nation's political integrity, economic security, health and welfare.

The Yakima Nation argues the "open" and "closed" areas of the reservation should be considered separately in determining Yakima County or the Yakima Nation has jurisdiction to regulate land use on non-member fee land within the reservation. *This distinction is completely untenable.*

For purposes of this case, the "closed" area is merely the "Reservation Restricted Area" land use classifications created by the Yakima Nation Zoning Ordinance. Amended Zoning Regulations of the Yakima Indian Nation, Section 23, JA 64-65.[3]

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[3] The argument of the Yakima Nation *amici*-Swinomish Tribal Community, *et al.* at 9-13 of its "Brief, *Montana* should apply only where tribal regulations treat members differently from non-members supports Petitioner's position in this case. Section 23 of the "Amended Regulations" purports to exclude non-members from the closed area unless on 5/06/72 they owned land in the area while permitting unrestricted access by tribal members.

Although some physical characteristics and land uses within the reservation restricted, closed area are different from the remainder of the reservation (a distinction preserved by Yakima County's classification of the closed area as "forest watershed" with the open area fee land zoned in various agricultural classifications), the *entire* reservation is subject to and governed by the same treaty, statutes and regulations.[4]

There is absolutely no legal basis for distinguishing the reservation restricted-closed area from the open area of the reservation to determine land use jurisdiction.

The Yakima Nation asserts Yakima County is preempted from regulating land use within the reservation because of Yakima County's limited interest, particularly in the "closed area". The Yakima Nation's preemption argument is *not* relevant because the tribe must first establish it has the authority to regulate non-member fee land within the reservation before any consideration is given to balancing the interests of competing sovereigns.[5]

As pointed out in Brendale's initial Brief, 19-23, the Yakima Nation has completely failed to establish facts necessary to support its zoning jurisdiction consistent with the second *Montana* exception.[6]

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[4] As pointed out in Brendale's initial Brief (3, 1a-5a), the BIA's 1972 "Public Notice" closure of the reservation restricted area to non-members has been invalidated.

[5] See: *New Mexico v. Mescalaro Apache Tribe*, 436 U.S. 324 (1983) where the tribe's authority to regulate non-member hunting on reservation land was established before the Court considered whether concurrent state regulation was preempted.

[6] Contrary to the statement in the Yakima Nation's Brief, 4 n.2, although the Trial Court found there were no "permanent residences" in the closed area, Finding of Fact 32, BA 94, the record demonstrates there are, however, numerous permanent residential structures in the closed area which are occupied on a seasonal basis consistent with Brendale's proposed development. (Brendale Brief, 4-5).

The truth is, Yakima County, in compliance with its ordinances and Washington State law has taken tribal interests and concerns into account and required preparation of an Environmental Impact Statement ("EIS") to resolve issues raised by the Yakima Nation before determining whether or not to approve or deny Brendale's application. This process (if permitted to continue to its conclusion) would preclude adverse impacts on tribal interests and demonstrate Yakima County's land use regulation of Brendale's property does not threaten or have any direct, adverse effect on the political integrity, economic security, health or welfare of the Yakima Nation.

B. County zoning of fee land within an Indian reservation does not *per se* threaten or direct the tribe's political integrity, economic security, health or welfare.

The Yakima Nation adopting the Ninth Circuit Court opinion argues: Land use jurisdiction is a fundamental power of local government, necessary to protect the "health and welfare" of its citizens, and, therefor, any limitation of a tribe's exclusive reservation-wide land use jurisdiction would be a *per se* threat to the political integrity, economic security, health and welfare of the tribe.

This sweeping generalization is a completely unacceptable basis on which to determine issues in this case.

This Court has previously recognized generalizations about tribal self-government are treacherous and there are no rigid formulas to determine if application of state laws infringe upon a tribe's political integrity. See: *Mescalaro Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980).

The inappropriateness of the formula proposed by the Yakima Nation and Ninth Circuit to determine zoning

jurisdiction within the reservation is demonstrated by the Yakima Nation's own actions. Although the Yakima Nation asserts it has the sovereign authority to regulate land use in the incorporated towns within the reservation, it has chosen not to do so.

Respondent-Yakima Nation has offered no explanation of how differing tribal and city land use regulation, particularly along the boundaries between the cities and unincorporated areas of the reservation pose any less of a threat to the tribe's political integrity than the differing regulations of the tribe and county in other areas of the reservation. The Tribe's acceptance of zoning by cities within the reservation without finding any threat to or adverse effect on its political integrity, health or welfare precludes any argument exclusive tribal land use jurisdiction over all land within the reservation is essential to preserve tribal self-government.[7]

Montana clearly requires Respondent-Yakima Nation establish the actions of Petitioners-Brendale and Yakima County pose some specific threat to or adverse effect on the Yakima Indian Nation's political integrity, economic security, health and welfare before it may assert civil regulatory jurisdiction over Brendale's previously allotted, fee simple land. Respondent's assertion exclusive tribal jurisdiction is necessary for effective comprehensive zoning is not substantiated by the facts of this case and fails to meet the criteria of the *Montana* exception.

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[7] The fallacy of the Ninth Circuit finding and the Yakima Nation's argument any county land use jurisdiction within the reservation threatens tribal self-government is further demonstrated by voluntary agreement pursuant to which a county zones fee land and a tribe zones trust land within the reservation. See: Amicus Brief of the Governing Council of the Pinoleville Indian Community, 10-11; 8/27/88 "Agreement" between Puyallup Indian Tribe, the United States and various local governmental agencies, Section VII, A1(a), 4 Appendix, 1a-3a.

IV. THE YAKIMA NATION'S ASSERTION OF JURISDICTION OVER THE USE OF FEE LAND WITHIN THE RESERVATION IS SUBJECT TO CONSTITUTIONAL LIMITATION.

As above-described, the Tribe's dependent status and Allotment Acts deprive the Yakima Nation of civil regulatory jurisdiction over non-members previously allotted fee land within the reservation. *Montana*, 450 U.S. at 559, n.9, 564. The Court must find there has been an "express delegation by Congress" to find the Yakima Nation has land use jurisdiction over Petitioner-Brendale's property. *Montana*, 450 U.S. at 564.

Talton v. Mayes, 163 U.S. 376, 16 S.Ct. 986 (1986), relied on by the Yakima Nation, does not, therefore, preclude application of constitutional limitations to the Tribe's actions. *Talton* precluded application of the U.S. Constitution Fifth Amendment only to the exercise of tribal powers not "created by and springing from the Constitution". 16 S.Ct. at 989. Because the jurisdiction to zone non-member fee land, if it exists, must be a delegated power, the *Talton* exemption from constitutional restrictions is inapplicable.

The extent to which an Indian tribe's exercise of delegated congressional authority over non-members is subject to constitutional limitations has not yet been decided. See: *United States v. Wheeler*, 435 U.S. at 328, n.28; *United States v. Mazurie*, 419 U.S. at 558, n.12.

Pursuant to the terms of the Yakima Nation Amended Zoning Regulations, Petitioner is prohibited from entering the reservation restricted area and obtaining any access to his property because he is not a tribal member and did not own the property in May, 1972. (JA 64, R 706) The zoning ordinance permits review of any tribal land use decisions only through an appeal to the Board of Adjustment which consists of the Tribal Council and provides for no judicial review of any zoning decisions

by the Tribal Court or otherwise. (Amended Regulations, Sections 8, 10, JA 49, 54.) If Brendale were to violate the Tribe's zoning regulations, the regulations authorize his complete exclusion from the reservation. (Amended Regulations, Sections 16, JA 56). The Yakima Nation asserts sovereign immunity prohibiting any suit against the Tribe, its officers and agents which would preclude any judicial review of tribal zoning decisions. (Amended Regulations, Section 10, JA 54, RB at 28, n.17). Brendale, although of Yakima Indian heritage, is denied membership in the Tribe because he lacks the required blood quantum and is, therefore, denied the right to vote or otherwise participate in a tribal government which claims the right to regulate the use of his fee land, to exclude him from access to his property while at the same time denying him any judicial review of tribal action.

The Tribe must, in its exercise of powers delegated by Congress, surely be held to the same constitutional standards which limit the authority of the sovereign granting it the powers, including the Fifth Amendment guarantees of due process and equal protection. *Cf. Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), applying the Fifth Amendment due process and equal protection requirements of the Fifth Amendment to invalidate federal civil service regulations prohibiting employment of aliens.

It is inconceivable Congress would intend, or the Constitution would permit, citizens to be denied any participation in tribal government but be subjected to regulations which impair and limit their vested property rights particularly where all opportunity for judicial review is denied.

V. CONCLUSION

For the reasons above-described and those contained in Petitioner-Brendale's opening Brief, this Court should reverse the Court of Appeals' 9/21/87 "Opinion" and the District Court's 9/11/85 "Judgment" as requested in Petitioner's opening Brief.

Respectfully submitted,

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